Supreme Court, U.S.
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No. 00-1068

IN THE

Supreme Court of the United States

BAYOU FLEET, INC.,

Petitioner,

v.

HOME PLACE BATTURE LEASING, INC.,
NEAL CLULEE, MARY CLULEE,
and N/C MATERIALS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Neither corporate respondent, Home Place Batture Leasing, Inc., or N/C Materials, Inc., has a parent company and no publicly held company owns 10% or more of the stock of either such respondent.

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STATEMENT OF THE CASE

This litigation grew out of a zoning dispute. The facts are summarized here; the trial court's opinion sets forth considerably more detail. *Bayou Fleet v. Alexander*, 68 F. Supp. 2d 734 (E.D. La. 1999), reproduced at petition for certiorari appendix p. 45.

Bayou Fleet operates a commercial sand pit in a residential area in St. Charles Parish, Louisiana.[1] In spring 1997, Bayou Fleet wanted to undertake a large job which would have involved a considerable increase in traffic to and from its pit. Local residents complained and circulated a petition opposing this undertaking.

A public controversy developed and a St. Charles Parish council member, Ellis Alexander, asked for a public hearing to determine whether Bayou Fleet's sand pit operation was properly zoned. The dispute became acrimonious and, after a lot of pulling and tugging, Bayou Fleet

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1. Mississippi River sand is useful for construction. To meet the demand for sand, "sand pit" operators such as Bayou Fleet dredge the Mississippi River, pump the sand into large open pits adjacent to the river, and then sell the sand to construction companies. The purchasers haul the sand away in trucks.

Since Bayou Fleet's sand pit is located in a residential area, Bayou Fleet can operate only as long as Bayou Fleet maintains "grandfather status": a nonconforming use is "grandfathered" if the use predated the enactment of the restrictive zoning code provisions. Local residents contend that Bayou Fleet lost "grandfather status" by closing the pit for more than six months, hence Bayou Fleet should not be allowed to reopen.

sued Mr. Alexander contending that Mr. Alexander's actions violated 42 U.S.C. § 1983 and were otherwise wrongful.[2]

Shortly after the suit was filed, Mr. Alexander persuaded the St. Charles Parish council to enact two ordinances which were detrimental to Bayou Fleet. The timing and circumstances were such as to suggest that Mr. Alexander was motivated, at least in part, by a desire to retaliate against Bayou Fleet for suing him.

Bayou Fleet amended its lawsuit. In the amendment, Bayou Fleet added St. Charles Parish as defendant, contended that the ordinances were unconstitutional, and sought an injunction against their enforcement. The trial court held a hearing on the injunction request and found the ordinances unconstitutional. *Bayou Fleet v. Alexander*, 1997 WL 625492 (E.D. La. 1997), reproduced at petition for certiorari appendix p. 24.

It should be noted that the amended complaint was filed on September 23 and the injunction hearing was held on September 30. Thus, the defendants had less than seven days to marshall evidence.

The trial court's ruling left Bayou Fleet's damage claim to be resolved. Ellis Alexander, claiming immunity, filed a motion for summary judgment and the trial court granted

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2. Bayou Fleet originally claimed violations of 42 U.S.C. § 1983, the Sherman Act, and the Louisiana Unfair Trade Practices Act (LUPTA). Bayou Fleet also named the Clulees (respondents here) as defendants.

On appeal, Bayou Fleet abandoned the Sherman Act and LUPTA claims. Thus, the § 1983 claim is the only matter still in dispute.

the motion. *Bayou Fleet v. Alexander*, 26 F. Supp. 2d 894 (1998). The Parish settled with Bayou Fleet for an amount substantially in excess of Bayou Fleet's claimed damages.[3]

This disposed of the lawsuit except insofar as it pertained to the Clulees.

The Clulees, through their corporations N/C Materials and Homeplace Batture, operate a sand pit near Bayou Fleet's and, thus, are business competitors of Bayou Fleet. The Clulees played a minimal role in the public debate over Bayou Fleet's zoning. However, Bayou Fleet contended (and still contends) that the Clulees communicated privately with Mr. Alexander and persuaded him to act. For example, Bayou Fleet contends that Neal Clulee telephoned Mr. Alexander and prompted him to propose the two ordinances which were eventually declared unconstitutional. Therefore, in Bayou Fleet's view, the Clulees should be held responsible for Mr. Alexander's actions and for the Parish council's decision to enact the two ordinances.[4]

The Clulees hotly deny any involvement in Bayou Fleet's difficulties. The Clulees contend that Bayou Fleet filed

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3. Bayou Fleet claimed damages of $20,013.22. The Parish paid $35,000 in settlement.

4. As noted above, Bayou Fleet claims to have sustained actual damages in the amount of $20,013.22 and the Parish settled for $35,000. Thus, Bayou Fleet has already received, in settlement, an amount substantially in excess of its actual damages. Thus, Bayou Fleet does not claim actual damages from the Clulees. What Bayou Fleet wants from the Clulees is one million dollars in punitive damages ($1,000,000).

the federal lawsuit in an effort to intimidate its critics and prevent a public hearing on the zoning dispute. The Clulees counterattacked by filing two state court lawsuits, one for malicious prosecution and the other seeking a public hearing to determine whether Bayou Fleet's sand pit business is properly zoned. These lawsuits are still pending in state court (proceedings were stayed until after the conclusion of the federal trial).[5]

After a trial on the merits, the trial court credited the testimony of the Clulees' witnesses and held that Bayou Fleet had not proved that the Clulees were involved in Mr. Alexander's actions (68 F. Supp. 2d at 744 and 746, petition for certiorari appendix pages 67, 71):

> [T]he court finds that the evidence fails to establish essential elements of the section 1983 and antitrust claims . . . The evidence fails to establish that the Clulee defendants had any involvement in the Parish attorney's investigation of the status of Bayou Fleet's non-conforming use, in the letter writing campaign that Alexander undertook to various political representatives and agencies, in the sales tax audit, the Levee Law ordinance, the Special Legal Counsel resolution,

5. The Clulees infer that Bayou Fleet's decision to file an application for certiorari with this Honorable Court was motivated, in part, by a determination to delay the state court litigation as long as possible. The titles and docket numbers of the two cases are: *Clulee v. Bayou Fleet, et al.*, number 49,963C on the docket of the 29th Judicial District Court for the Parish of St. Charles, State of Louisiana; *Clulee v. Tregre, et al.*, number 50,906C on the docket of the 29th Judicial District Court for the Parish of St. Charles, State of Louisiana.

> the requirement of a Change of Occupancy Permit, the requirement of a permit to install the guard shack, or any delays associated with those two permits . . . Having found insufficient evidence of a conspiracy or joint action to equate the Clulee defendants' conduct with state action, any conduct of Alexander that violated Bayou Fleet's constitutional rights is not actionable under § 1983 as to the Clulee defendants.

The court added that, to the extent that the court's fact findings after trial on the merits might appear to differ from the findings made after the injunction hearing, this was explained by the fact that, at trial, the court had heard new evidence which was not presented at the injunction hearing (footnote 11, 68 F. Supp. 2d at 746, petition for certiorari appendix p. 70; footnote 12, 68 F. Supp. 2d at 747, petition for certiorari appendix p. 71):

> In the prior opinion rendered by this court, the court noted that there was no evidence presented at the hearing on the permanent injunction that Bayou Fleet's or any other sand pit's operations caused problems in the community . . . such evidence was presented at the trial on the merits of plaintiff's claims . . . Neither the Clulees nor Alexander testified at that prior hearing . . .

As an alternative ground for its holding, the trial court found that, even if the Clulees had done everything Bayou Fleet alleged, nevertheless the Clulees would not be liable because their (alleged) actions are protected under the Noerr-Pennington doctrine.

Here, it is important to note that the district court cited two alternative and independent grounds for decision, either of which would, alone, be sufficient to justify a judgment in favor of the Clulees. Thus, to obtain reversal, Bayou Fleet would be forced to demonstrate two things:

(1) the district court's fact findings are clearly erroneous; *and, also,*

(2) the Clulees' (alleged) actions are not protected under Noerr-Pennington.

The evidence presented at trial is set forth in detail in the trial court's opinion. As a review of this portion of the opinion will make clear, there was ample evidence to support the trial court's conclusions and, therefore, there is no rational basis for arguing that the trial court's fact findings are clearly erroneous.

On the face of it, Bayou Fleet's appeal was hopeless from the start.

In an attempt to avoid this trap, Bayou Fleet chose an unpleasant tactic. Instead of arguing that the trial court's fact findings were clearly erroneous[6], Bayou Fleet made a personal attack on the trial judge: Bayou Fleet argued that the fact findings should be set aside because the trial judge had acted as a mere figurehead and had allowed the law clerk to preside over the trial, thus violating Bayou Fleet's First Amendment right of access to the court (Bayou Fleet was

6. Bayou Fleet did argue "clear error" at the tail-end of its appellate brief (Bayou Fleet's Issue 6 on appeal), but this was not the primary avenue of attack.

forced to ask for a "plain error" review of this argument, since, at the trial level, Bayou Fleet never made any objection to any aspect of the district judge's trial management).

The Fifth Circuit affirmed the decision of the trial court. *Bayou Fleet v. Alexander,* 234 F.3d 852 (5th Cir. 2000). With regard to the issue of the trial judge's behavior, the appellate panel stated (234 F.3d at 858, petition for certiorari appendix p. 12):

> Our review of the record persuades us that Bayou Fleet was not denied meaningful access to the courts. The judge was engaged in the pretrial stage and the trial itself. He questioned both witnesses and lawyers during the trial, ruled on the evidence, and made those decisions that were necessary for a traditional trial.

The appellate panel also analyzed the Noerr-Pennington issue at some length and concluded that the trial court was correct in determining that the actions allegedly taken by the Clulees were within the scope of Noerr-Pennington.

The decision to affirm was unanimous.

This Honorable Court's Rule 15.2 requires your respondents to identify any perceived misstatements made in the petition for certiorari. Your respondents find it somewhat difficult to separately identify each and every misstatement, as the petition for certiorari is drafted in such a fashion as to state, or imply, that Bayou Fleet's allegations of conspiracy are accurate, even though the trial court expressly found that these allegations were unsupported by the evidence.

Furthermore, Bayou Fleet repeatedly references the preliminary fact findings contained in the trial court's opinion on the injunction as though these were the controlling fact findings in the case, even though the trial court qualified and modified these fact findings after trial on the merits.

Thus, Bayou Fleet's description of events is inaccurate in most important respects. Specific examples of inaccuracy include the following:

(1) petition page 3 footnote 2: "Bayou Fleet amended its lawsuit an additional time to add the Clulees' other company, N/C Materials, Inc., as a defendant when it discovered that they had involved it in the conspiracy." This statement assumes the existence of a conspiracy, as well as the existence of evidence demonstrating the involvement of N/C Materials, Inc., in spite of the fact that the trial court found, as a matter of fact, that the Clulees were not involved in any conspiracy and that N/C Materials was not involved in any conspiracy.

(2) petition page 4 paragraph 2 (variations of this statement are repeated several times in the petition for certiorari): "The district court ruled that Bayou Fleet's property had maintained its non-conforming status." Actually, as the district court explained at the time of modifying the consent judgment, and as the Fifth Circuit also explained in connection with its analysis of Bayou Fleet's arguments relating to the consent judgment, the district court did NOT rule that Bayou Fleet's property had maintained its non-conforming status. The district court expressly avoided ruling on this issue and, instead, left the matter to be resolved in state court. The district court modified the consent judgment to ensure that the events in federal court would not be treated as res judicata of the zoning issue.

(3) petition page 8 paragraph 2: "The petitioner's First Amendment right of access to the courts has been trumped by the respondents' First Amendment right to petition the government." This statement assumes that the lower courts found that respondents violated petitioner's right of access, and that the lower courts excused respondents' wrongful actions because of excessive concern over respondents' right to petition. Again, the trial court found that, as a matter of fact, that the Clulees did NOT retaliate against Bayou Fleet. Therefore, there was no need to weigh the right of access against the right to petition.

(4) petition page 11 paragraph 2: "Whether Noerr-Pennington immunity should protect a defendant who retaliates . . ." This statement assumes that the defendants have retaliated. Again, the trial courts' fact findings were that the Clulees did NOT retaliate.

(5) petition pages 18, *et seq.* The petitioner offers a dramatic description of the alleged emotions of Bayou Fleet's president and major shareholder, Robin Durant, on witnessing the alleged misconduct of the trial judge and the trial judge's law clerk (e.g., "the client was amazed" at page 19; "Mr. Durant and Bayou Fleet were stunned" at page 21). This is completely unsupported by anything in the record. At trial, Bayou Fleet raised no objection to the trial judge's management of the case (hence the necessity for requesting a plain error review). Robin Durant did not offer an affidavit, a deposition, or even an unsworn statement in support of these allegations.

(6) petition page 22: "Whether, after a trial, a partial consent judgment can be modified by the district court based upon the lack of consent of a party." In the first place, the

consent judgment was entered prior to, rather than after, trial on the merits. (Bayou Fleet wishes to treat the injunction hearing as the equivalent of a trial, see point 8 below for more detailed discussion). In the second place, the district court did not modify the consent judgment because of a misguided belief that the Clulees' consent was required for entry of judgment, the district judge modified the consent judgment when he learned that Bayou Fleet had used the consent judgment to prevent a state court from holding a hearing to determine whether Bayou Fleet was operating in violation of the zoning code.

(7) petition page 23: "The Clulees' state court lawsuit was a mandamus action which sought to have the state court prevent the Parish Council from voting on whether it should approve the settlement in this case." Absolutely untrue. The Clulees' state court lawsuit is a mandamus action asking the state judge to order parish officials to hold a public hearing to determine whether Bayou Fleet is operating in violation of the zoning code. The Clulees' mandamus action was filed prior to the confection of the consent judgment and a hearing had already been scheduled when the consent judgment was signed. Bayou Fleet used the consent judgment to obtain a postponement of the hearing by using it as the basis for an inaccurate claim of res judicata.

(8) petition page 23: "the appellate court . . . completely disregarded the trial on the merits (which the Clulees participated in) wherein the district court ruled that Bayou Fleet's property had maintained its non-conforming status." There was no trial on the merits as to the zoning issue. Bayou Fleet asked for an injunction against the Parish to prevent enforcement of the ordinances. There was no request for an injunction against the Clulees; at the time of the hearing on

the injunction, Bayou Fleet's only claim against the Clulees was a damage claim which was on the docket for trial by jury (the parties eventually waived the jury). Thus, the trial court held a hearing on the request for injunction against the Parish. The issue was constitutionality of the ordinances, not propriety of Bayou Fleet's zoning. The Clulees' interests were not in play and they attended the hearing but did not offer any evidence.

REASONS FOR DENYING THE WRIT

I. Whether the trial court's fact findings should be set aside because of alleged improper conduct by the trial judge and/or the trial judge's law clerk. (Bayou Fleet's "Questions Presented 5", restated)

Initially, it should be noted that, in its petition for certiorari, Bayou Fleet makes an argument that was not presented to the Fifth Circuit. More specifically, the issue actually presented to, and ruled on by, the Fifth Circuit was formulated by Bayou Fleet as follows:

> The district court violated Bayou Fleet, Inc.'s First Amendment right of access to the court (Bayou Fleet's Issue 1 on appeal, quoted verbatim from Bayou Fleet's original brief on appeal).

The Fifth Circuit summarized Bayou Fleet's argument as follows (234 F.3d at 857, petition for certiorari appendix p. 9):

> Bayou Fleet claims that the law clerk directed the district judge during the course of proceedings to the extent that the law clerk effectively presided over the trial.

In its petition for certiorari, Bayou Fleet has subtly but significantly altered its position. Instead of alleging that the trial judge actually allowed the law clerk to preside, Bayou Fleet now argues that the trial court's fact findings should be rejected because of "an appearance of impropriety." This is not merely a cosmetic change in phrasing: it is a question of substance (whether the judge actually transferred power to the law clerk) versus appearance (whether the judge erred by allowing the law clerk to conduct herself in an inappropriate fashion). Bayou Fleet asked the Fifth Circuit to decide the substantive issue; Bayou Fleet did not ask the Fifth Circuit to rule on whether an "appearance of impropriety" could justify reversal.

Your respondents contend that, because the "appearance of impropriety" issue was not presented to the Fifth Circuit, therefore it is not properly before this Honorable Court.

No matter how the issue is phrased, the practical effect is the same. What Bayou Fleet wants this Honorable Court to do is read the trial record and evaluate the behavior of the trial judge and law clerk for the purpose of determining whether to accept or reject the trial court's fact findings. As per this Honorable Court's Rule 10, issues of this type are not normally a basis for granting a writ of certiorari.

Bayou Fleet has not suggested any unusual considerations which would justify making this case an exception to the general rule.

If this Honorable Court agrees with respondents that the issue is not properly before the Court and/or that the issue is unsuitable for review on certiorari, this disposes of the certiorari petition: the trial court's fact findings provide a basis for the decision which is alternative to, and independent of, the Noerr-Pennington issues.

II. Whether the scope of Noerr-Pennington is the same in Sherman Act and § 1983 cases (Bayou Fleet's "Questions Presented 1-3", restated)

The Fifth Circuit concluded that the scope of Noerr-Pennington is the same in antitrust and § 1983 cases. This is an issue on which reasonable minds can differ. However, the circumstances are such that a grant of certiorari to consider this issue is not appropriate, for three reasons.

First, the issue isn't ripe for review by this Court. In the reported cases in which a § 1983 defendant has relied on Noerr-Pennington, the courts and parties have simply assumed, with little or no analysis, that the scope of Noerr-Pennington is the same in § 1983 and antitrust litigation. *See, e.g., Eaton v. Newport Board of Education*, 975 F.2d 292, 298-299 (6th Cir. 1991); *Tarpley v. Keistler*, 188 F.3d 788 (7th Cir. 1999); *Boulware v. State of Nevada*, 960 F.2d 793, 800-801 (9th Cir. 1992); *Cheminor Drugs, Ltd. v. Ethyl Corporation*, 168 F.3d 119, 122-123 (3d Cir. 1998). As far as your respondents are aware, the Fifth Circuit is the only federal circuit that has undertaken a serious analysis of the issue; to our knowledge, there are no other decisions which either agree with, or conflict with, the decision of the Fifth Circuit.

Thus, our case does not meet the criteria of Rule 10: there is no conflict among lower courts. To the contrary, the law in this area is undeveloped to the point that it is not clear whether a conflict will ever occur.

Bayou Fleet argues that a grant of certiorari is appropriate because, if the Fifth Circuit's decision is allowed to stand, there will be an immediate, dramatic, and very

negative effect on § 1983 litigation. What Bayou Fleet ignores is that the Fifth Circuit's decision does not state a new legal principle. To the contrary, the Fifth Circuit has merely reiterated the conclusion reached by an earlier panel of the same circuit in *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988). The effect of the *Video International Production* decision on § 1983 litigation has been minimal to non-existent. There is no reason to suppose that the current panel's decision will have greater impact, especially since, as examination of the cases cited in the preceding paragraph will show, appellate courts already tend to assume that the scope of Noerr-Pennington is the same in antitrust and civil rights litigation and it does not appear that there have been any significant evil consequences as a result of this assumption.

The second reason why this issue does not justify a grant of certiorari has to do with the particular facts of our case. What Bayou Fleet alleges, reduced to its simplest terms, is that Neal Clulee telephoned a parish council member, Ellis Alexander, and asked Mr. Alexander to propose and vote for two ordinances which negatively impacted Bayou Fleet and which were eventually held to be unconstitutional. Bayou Fleet argues that Mr. Clulee should be liable for his (alleged) actions because Mr. Clulee was (allegedly) motivated by a retaliatory or anti-competitive intention toward Bayou Fleet.

It is well established that a private individual cannot be held liable under § 1983 for advocating legislation which is thereafter enacted and eventually held unconstitutional. *See, e.g., Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615 (8th Cir. 1980) and cases cited therein. As far as your respondents are aware, no court has ever held that § 1983

liability may be imposed on a private citizen who advocates passage of a particular piece of legislation subsequently found to be unconstitutional. Indeed, an attempt to impose such liability (based on examination of the private citizens' motives to determine whether the motives are pure or not) would be seriously disruptive of the democratic process.

Therefore, it is quite possible that some court somewhere will eventually disagree with the Fifth Circuit's broadly stated conclusion that the scope of Noerr-Pennington is identical in antitrust and § 1983 cases. However, it is extremely unlikely that any court will ever adopt an interpretation of Noerr-Pennington which would permit imposition of § 1983 liability on a private person in circumstances analogous to those presented (or allegedly presented) here. In practical terms, it is extremely unlikely that a review by this Honorable Court would result in an interpretation of Noerr-Pennington which would require reversal of the Fifth Circuit's decision.

There is one additional point which may be worthy of consideration. This is a case which can easily be decided on the facts: the trial judge found no conspiracy, the appellate court found no basis to set aside the trial court's factual conclusions, therefore (unless this Honorable Court chooses to examine and reject the trial court's fact findings) the Clulees will prevail irrespective of whether Noerr-Pennington is found to apply to their (alleged) actions. In the strict sense, the entire discussion of Noerr-Pennington — at both the trial and appellate level — is dictum.

It is worth asking, what is there about this case that prompted first the trial judge, then the appellate panel, to go far beyond the immediate facts in order to expound at length

on the Noerr-Pennington issues? Your respondents would suggest that the answer can be found by reviewing the history of this litigation. The litigation began as a zoning dispute. Bayou Fleet conducted a commercial operation in a residential neighborhood; residents contacted government officials to complain that this violated the zoning code; the local council member, Mr. Alexander, called for a public hearing to determine whether Bayou Fleet's operation was in violation of the zoning code or not; Bayou Fleet responded by filing a federal lawsuit which resulted in termination of the public debate and indefinite postponement of the public hearing.

This fact pattern demonstrates that 42 U.S.C. § 1983 can be a very powerful antidemocratic weapon. This fact pattern also demonstrates that there are many circumstances in which a prospective § 1983 plaintiff has a powerful economic motive for using § 1983 as an antidemocratic weapon. As far as your respondents can tell, the trial and appellate courts in our case went out of their way to emphasize the availability of Noerr-Pennington protection because they were concerned about the potential for such misuse. This is not a case in which the Fifth Circuit has showed insensitivity to civil rights claimants. The Fifth Circuit's decision was a reasonable one in view of the policy considerations presented.

In sum, the trial judge and three appellate judges have examined Bayou Fleet's Noerr-Pennington arguments. All four judges agreed that Bayou Fleet's contentions are meritless. There is no reason for this Honorable Court to reexamine their decision.

III. Whether the Clulees waived the right to claim Noerr-Pennington protection by failing to plead Noerr-Pennington as an affirmative defense (Bayou Fleet's "Question 4", restated).

There is considerable authority for the proposition that Noerr-Pennington is NOT an affirmative defense and that the plaintiff has the burden to allege and prove conduct outside the protective confines of Noerr-Pennington. *See* the list of authorities cited in footnote 9 of the trial court's opinion on the merits (68 F. Supp. 2d at 743, appendix to petition for certiorari pages 63-64) as well as *Hospital Building Company v. Trustees of the Rex Hospital,* 791 F.2d 288 (4th Cir. 1985) and cases cited therein, and this Honorable Court's opinion in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) (in which this Honorable Court repeatedly references the plaintiff's burden to disprove Noerr-Pennington). The Clulees did not raise Noerr-Pennington as an affirmative defense in their answer. They did raise the issue in the pretrial order and in their trial brief (filed approximately a month prior to the date of trial).

Bayou Fleet responded by arguing that Noerr-Pennington was an affirmative defense and the Clulees had waived it by failing to raise it in the answer. Plaintiffs sought to cure any procedural error by filing a belated motion to amend their answer. The trial judge denied the motion to amend as tardy, but considered the merits of Noerr-Pennington because the defense had suffered no prejudice by the non-inclusion of the issue in the Clulees' answer. The Fifth Circuit, concurring with the trial court's analysis, affirmed (but stated, to prevent future confusion, that in the Fifth Circuit's opinion, Noerr-Pennington is an affirmative defense and should be pleaded as such).

Trial courts have wide discretion in matters of this type and the trial court's decision was reasonable.

IV. Whether the trial judge abused his discretion in deciding to modify the consent judgment (Bayou Fleet's "Question 6", restated)

When Bayou Fleet settled with the Parish, the settlement included provisions designed to prevent future challenge to Bayou Fleet's zoning. Bayou Fleet asked the district court to incorporate the settlement into a consent judgment, which the district court agreed to do.

At the time the settlement was reached, the Clulees had already filed a lawsuit seeking a public hearing on the zoning issue and a hearing date had been fixed. Bayou Fleet produced the consent judgment in state court, argued that the consent judgment had a res judicata effect, and obtained an indefinite continuance of the hearing date.

The Clulees asked the district court to modify the consent judgment so that it would be clear that the judgment did not have a res judicata effect as to the Clulees. The district court granted the Clulees' request. The Fifth Circuit found no abuse of discretion. Your respondents would adopt the Fifth Circuit's legal analysis of this issue.

CONCLUSION

For the above and foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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